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In the Supreme Court of the United States

OCTOBER TERM, 1976

HARRY BERNSTEIN, ROSE BERNSTEIN, and
EASTERN SERVICE CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

FLORENCE BEHAR, PETITIONER

v.

UNITED STATES OF AMERICA

MELVIN CARDONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 75-1798

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No. 75-6911

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Bernstein Pet. App. C) is reported at 533 F.2d 775.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1976. Petitions for rehearing were denied on May 14, 1976. The petitions for a writ of certiorari were filed on June 11, 1976 (No. 75-1798) and June 14, 1976 (Nos. 75-1810 and 75-6911). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a lending institution and its officers, who participate in the Federal Housing Administration's mortgage insurance program, have a fiduciary duty reasonably to assure themselves of the truth of information submitted to FHA in support of applications for insurance, such that their reckless disregard for the truth or falsity of such information in the face of highly suspicious circumstances can be the basis of a finding that they knew the information was false.

2. Whether petitioner Behar was unconstitutionally denied representation by retained counsel and whether her court-appointed counsel rendered ineffective assistance.

3. Whether the false statement counts of the indictment sufficiently stated an offense.

4. Whether there was an impermissible variance between the conspiracy alleged and the conspiracy proven.

5. Whether a portion of the bribery counts against petitioners Harry Bernstein and Eastern Service Corporation was multiplicitous.

6. Whether there was an impermissible joinder of parties and counts, and whether the length of the trial resulted from an abuse of prosecutorial and judicial discretion.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners Harry and Rose Bernstein, Eastern Service Corporation, Florence Behar, and Melvin Cardona were convicted of conspiracy (18 U.S.C. 371), bribery of public officials (18 U.S.C. 201), and submitting false statements (18 U.S.C. 1010) in connection with applications for mortgage insurance filed with the Federal Housing Administration of the Department of Housing and Urban Development.[1] For the con-

[1] The instant indictment, one of 13 returned in the Eastern District of New York charging numerous individuals and corporations with crimes related to the operation of the FHA mortgage loan guaranty program, named 21 individuals and 2 corporate defendants in a total of 211 counts. The case ultimately went to trial on 65 counts charging 9 defendants. The jury acquitted one defendant on all counts and disagreed with respect to three other defendants on all counts submitted to it. Thereafter, the court granted motions for judgment of acquittal on all counts as to two of those three defendants.

venience of the Court, petitioners' convictions and the sentences and fines imposed are set forth in the accompanying footnote (all terms of imprisonment run concurrently, all fines are cumulative).[2] The court of appeals affirmed in a comprehensive opinion, with one judge dissenting (Bernstein Pet. App. C1-C73).

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[2]

Petitioner	Convictions	Sentence	Fine
Harry Bernstein	conspiracy	5 years	$10,000
	bribery (16 counts)	5 years (ea.)	10,000 (ea.)
	false statements (1 count)	2 years	5,000
		TOTAL	$175,000
Rose Bernstein	conspiracy	4 years	$10,000
	bribery (4 counts)	4 years (ea.)	10,000 (ea.)
		TOTAL	$50,000
Eastern Service Corp.	conspiracy		$10,000
	bribery (18 counts)		20,000 (ea.)
	false statements (18 counts)		5,000 (ea.)
		TOTAL	$460,000
Florence Behar	conspiracy	2 years	
	bribery (3 counts)	2 years (ea.)	$ 1,000 (ea.)
	false statements (18 counts)	2 years (ea.)	1,000 (ea.)
		TOTAL	$21,000
Melvin Cardona	conspiracy	2 years	
	false statements (17 counts)	2 years (ea.)	$ 1,000 (ea.)
		TOTAL	$17,000

The evidence, as summarized by the court of appeals (Bernstein Pet. App. C4-C13), showed a scheme by petitioners to exploit for their own gain the operation of the loan guaranty program of the Federal Housing Administration (FHA). To accomplish this scheme, the Bernstein petitioners bribed FHA staff appraisers and thereby obtained favorable FHA property appraisals on behalf of petitioner Eastern Service Corporation (ESC), a lending institution wholly owned by petitioner Harry Bernstein. ESC also obtained FHA approval of the credit of individual mortgagors by means of false credit statements submitted by petitioner Behar, who was an assistant vice president of ESC in charge of the mortgage processing section. A number of these mortgage applications were solicited by petitioner Cardona, an employee of ESC, who also obtained false financial reports on the mortgagors' behalf.

1. The FHA loan guaranty program

Under the FHA loan guaranty program, FHA grants mortgage insurance to a lender-mortgagee, who is thereby insured against loss if the mortgagor is unable to repay the loan. The mortgage insurance of the type involved in this case is obtained in a two-step procedure. First, the mortgagee applies to FHA for an appraisal of the property for which a mortgage is sought (using a "Form 2800"). Second, the mortgagee submits an application package ("Form 2900") for approval of the mortgagor's credit, which includes a credit report, verification of employment

form, verification of bank deposits, and the like. If appraisal by FHA reveals that the property has sufficient value, FHA issues a conditional insurance commitment, which becomes firm once the mortgagor's credit is approved as satisfactory.

Mortgage companies such as ESC loan money to home buyers, then sell the mortgage loans to permanent lenders such as savings banks, pension funds, and the Federal National Mortgage Association. These institutions in turn retain the mortgage company to "service" the mortgage. ESC's special position and the advantages accruing to it as an FHA "approved mortgage lender" [3] were described by the court of appeals (Bernstein Pet. App. C7):

> ESC was an FHA "approved mortgage lender" and as such, lending on an interim basis, it was able to make considerable profits with very little risk and with a limited use of capital. In the nature of economic life, once FHA mortgage insurance has been procured only low down payments are required, a permanent lender is readily available to purchase the mortgage from the interim lender, and if the mortgage goes into foreclosure the interim lender knows that the FHA will pay virtually full value on the outstanding loan so that there is no great risk of foreclosure. The risk is, in fact, for all practical purposes after assorted points are charged, close

[3] Section 203(b), National Housing Act, as amended, 52 Stat. 10, 12 U.S.C. 1709(b), provides in part that "[t]o be eligible for insurance under this section a mortgage shall * * * (1) Have been made to, and be held by, a mortgagee approved by the Secretary as responsible and able to service the mortgage properly."

> to zero. The Government proof adduced was also to the effect that at least as to the second phase of the mortgage insurance process—the mortgagor's credit—the FHA is dependent upon the approved mortgagee, and we may say upon the latter's integrity. This is so because only the mortgagee personally interviews the mortgagor and it is the mortgagee which has the obligation to obtain verification of employment and income and to obtain other credit information regarding a mortgagor's employment and income.

2. The bribes

As the court of appeals noted (Bernstein Pet. App. C6), the government's proof on the bribery counts "went to the very heart of the FHA [regional] office." It implicated, *inter alia*, Edward Goodwin, an FHA staff appraiser; Rose Cohen, who assigned appraisal applications to Goodwin; Joseph Jankowitz, who reviewed Goodwin's appraisals; and Herbert Cronin, the chief underwriter for the regional office, who supervised appraisals and who possessed the "chief underwriter's prerogative" (CUP), which gave him discretion to increase an FHA appraisal by as much as $500 on an individual property.

In late 1966, the Bernstein petitioners approached Goodwin on behalf of petitioner ESC and Jet Warehouse, Inc., another company wholly owned by petitioner Harry Bernstein.[4] After an initial meeting,

[4] Jet Warehouse was a real estate speculating company in the Brooklyn, New York, area. It held second mortgages on properties and also loaned money to other speculators for

Goodwin, at the suggestion of petitioners Harry and Rose Bernstein, agreed to an arrangement that would pay him $50 for each inflated appraisal he made on applications submitted by ESC (Tr. 11851-11865, 11960-11979). Goodwin and Harry Bernstein devised a plan for covertly identifying Jet Warehouse properties, on which Bernstein wanted "top dollar" appraisals; when Goodwin called ESC to arrange appraisal appointments, Bernstein would refer to Jet Warehouse properties as "ORE," meaning "our real estate" (Tr. 11979-11986, 12040-12051). Thereafter Goodwin met regularly with both Bernsteins and received bribes in return for inflated initial appraisals.[5]

Numerous other bribes were paid in connection with the so-called Kapraki properties. Ortrud Kapraki, like Jet Warehouse, engaged in large-volume real estate speculation in Brooklyn. When she began

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purchase of properties until FHA approval and permanent financing was obtained.

[5] Providing an initial high appraisal was only part of the services for which the Bernstein petitioners bribed Goodwin. In several cases, when ESC submitted a request for a reevaluation, Chief Underwriter Cronin would return the files to Goodwin with inquiries such as, "Is that all it's worth? Take another look." Goodwin would then routinely increase the value of the appraisal and return the file to Cronin. Cronin, in turn, would exercise the CUP prerogative and raise the value by another $500 (*e.g.*, Tr. 12631-12635, 12144-12281). As the court of appeals summarized this phase of the scheme (Bernstein Pet. App. C8-C9): "For four years, and through hundreds of these appraisals, ESC and the Bernsteins would obtain high initial appraisal, frequent upward reevaluation, and then the almost omnipresent CUP."

to submit a substantial number of FHA applications to ESC, petitioner Behar (head of processing for petitioner ESC) told her that she should have the right appraiser and that it was important to pay the appraisers at the going rate of $50 per property. Behar introduced Kapraki to Harry and Rose Bernstein, who also told her she would have to "take care of" the appraisers. Thereafter Kapraki would tell Behar when she wanted the "right appraiser," Behar would inform the Bernsteins, and the latter would arrange to have either Goodwin or Joseph Jankowitz do the appraising. Kapraki would then meet the appraiser each time and pay him $100 per property appraised (Tr. 3107-3111, 5010-5129, 5175-5233, 5251-5345, 12839-12940).

As with the Jet Warehouse properties, the Bernstein petitioners insured that the "right" FHA appraisers were assigned to the Kapraki properties by means of bribes. As the court of appeals noted (Bernstein Pet. App. C10), "[t]here was evidence, indeed, that for at least two years Rose Cohen * * * was receiving bribes from Rose Bernstein to assign [Kapraki] cases to particular appraisers, especially Goodwin and Jankowitz."

3. The false statements

All petitioners except Rose Bernstein were convicted of having submitted false statements of employment or self-employment of purchasers in mortgage applications, relating to the Kapraki properties, in which they certified that the information submitted

was true and complete to the best of their knowledge and belief (see Form 2900 at C.1129).[6] Petitioner Cardona, a commissioned mortgage solicitor for ESC, had originally secured Kapraki as an ESC customer. After a number of Kapraki's applications had been turned down by FHA, Kapraki began, with Cardona's aid, to create false appearances of sufficient income on the applications. At first they relied on false verifications of employment obtained from business acquaintances of Kapraki, until Kapraki learned that she was acquiring a "reputation" for performing such a service (Tr. 3085-3088, 3273-3275). Cardona then told Kapraki that they could use an accountant in the Bronx, Walter Blow, who would prepare false financial statements as to self-employment for the applicants (Tr. 3724-3735).[7] Blow's statements eventually drew suspicion, whereupon Cardona recruited another accountant to perform Blow's service (Tr. 7550-7592). Cardona also advised Kapraki regarding other techniques for assuring FHA approval, such as submitting false affidavits to substantiate exaggerated down-payments, forging lawyers' signatures for false escrow letters, and altering the age of the mortgagor in the application forms

[6] "C." refers to volumes V and VI of the appendix in the court of appeals.

[7] Cardona had learned of Blow at an ESC sales meeting, at which petitioner Harry Bernstein also was present: the sales manager had announced that there was an accountant in the Bronx, Walter Blow, who prepared financial statements on self-employed mortgage applicants.

(Tr. 3221-3229, 3253-3265, 3540-3545). Kapraki gave Cardona $95 for each set of accountant's false financial statements and $145 for such a set plus false income tax returns (Tr. 3740-3746, 4421).

Petitioner Behar, as the court of appeals observed (Bernstein Pet. App. C11), "took * * * a special interest in Kapraki's applications, no doubt because of their volume and profitability to ESC." Behar assigned an experienced processor, Pat Buckley, to handle the Kapraki applications. Kapraki paid Buckley $50 per case. For Behar's own aid in expediting applications, Kapraki paid her cash sums eventually amounting to $250 per property (*e.g.*, Tr. 3101-3113, 4331-4332, 4490-4512). The court of appeals described Behar's role in regard to the false statements as follows (Bernstein Pet. App. C12):

> Behar's assistance in expediting applications went beyond a passive acceptance of their content. Behar told Kapraki to have her mortgagors sign the applications in advance in blank and, knowing that [the mortgagors] were certifying to the truth and completeness of information which was only later typed in by Kapraki, Behar as the chief supervising processing officer of ESC would nevertheless sign the mortgagee's certification to the FHA verifying the truth of the information in the applications. Cardona and Behar also gave Kapraki blank verification of employment forms, in violation of FHA requirements. [Tr. 3276-3280.] When Behar called Kapraki to tell her that Dun & Bradstreet, ESC's credit report service, was inquiring why

> so many of Kapraki's mortgage applicants worked at the "Bocar" service station, Behar asked, "They all work there, don't they?" But she never sent an employee of ESC out to check with this supposed employer. Cardona simply told Kapraki not to use the same place all the time. [Tr. 3287-3290.]

Eventually Frank Fey, a vice president of ESC, became suspicious of the Kapraki applications because they repeatedly carried self-employment verifications from the same accountant, Walter Blow. Fey told petitioner Behar that he thought the applications were "phonies" (Tr. 10772-10775).[8] In two succeeding conversations with petitioner Harry Bernstein, Fey expressed the same fear that the Kapraki applications were "frauds." Both times Bernstein replied to the effect that "[w]e don't investigate these applications, we don't play detective, we send these applications down to the FHA and they decide whether they are good or bad applications, we don't" (Tr. 10777-10782a, 11555-11558). Petitioner Rose Bernstein, who was present at one of these meetings, reminded Fey: [D]o [you] realize how many points Eastern Service charges Mrs. Kapraki on her applications?"

[8] Thereafter Kapraki and Cardona replaced Blow with another accountant who continued the pattern of verifying self-employment, and Behar continued to sign the mortgagee's certificate on the application attesting to the truth of the information (Tr. 11570).

4. The jury instructions relating to the false statement counts

In its charge to the jury, the court explained that the *scienter* requirement of 18 U.S.C. 1010[9] could be satisfied by proof that the defendant actually knew the statements were false or that he deliberately avoided learning whether they were true or false.[10] The court added (C. 512):

[9] 18 U.S.C. 1010 provides in relevant part:

> "[W]hoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, * * * or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

[10] The court stated in this regard (C. 511):

> However it is not necessary that the government prove to a certainty that a defendant knew a statement was false. Although guilty knowledge cannot be established by proof of mere negligence on the part of a defendant, such knowledge is established if the defendant was aware of the high probability that a statement was false, unless that defendant actually believed that the statement was not false.
>
> In this regard you may consider whether a defendant deliberately closed his eyes to what otherwise would have been obvious to him. No person can intentionally avoid knowledge by deliberately closing his eyes to what otherwise would have been obvious to him.
>
> Thus if you find beyond a reasonable doubt that a defendant acted with a conscious purpose in avoiding learning whether a statement was true or false, the requirement of knowledge would be satisfied.

> * * * in the context of this case there is a third way of satisfying the requirement of knowledge. Where a person who makes, passes, utters or publishes a false statement is under an affirmative duty to investigate[,] the element of knowledge is satisfied by proof beyond a reasonable doubt that a defendant recklessly stated as facts things of which he was ignorant, or acted with a reckless disregard of [whether the] statements made were true.

The court amplified this instruction, charging the jury (C. 512-513):

> [In light of the evidence presented, including] the underlying policy of reliance by the FHA on the mortgagee to submit complete and truthful information, you may find that the FHA program places a duty on the mortgagee to investigage and exercise proper credit judgment with respect to statements contained in applications for mortgage insurance submitted to the FHA.
>
> Now, if you find that there is such an affirmative duty, then the standard of recklessness, which I mentioned earlier, is applicable to the defendant Eastern Service Corporation, which is an approved mortgagee.
>
> You should also in that regard consider what persons played a role in setting the policy of Eastern Service Corporation with respect to credit applications, and what person had the responsibility to sign the mortgagee certificate on behalf of Eastern Service Corporation. Also, in this regard you may determine whether or not the evidence shows beyond a reasonable doubt that the defendants Harry Bernstein and Florence Behar occupied such a position. You may find that any person in such a position had an affirmative duty to insure that statements made in the application were true, and if you so find, then the standard of recklessness is also applicable to such a person.[11]

At the conclusion of its charge, the court agreed with the prosecutor's suggestion that it clarify the nature of the mortgagee's duty in order to forestall any misapprehension occasioned by the court's use of the term "insure." The court thereafter told the jury (C. 709):

> You will recall that I referred to affirmative duty as being a question of fact for you to determine if the FHA [imposes] an affirmative duty on various defendants. I would like to clarify the nature of that duty which you may or may not find exists.
>
> As to Eastern Service, Harry Bernstein and Florence Behar, the question is, one, was there a duty to investigate and exercise proper credit judgment with respect to statements contained in applications for mortgage insurance submitted to the FHA?

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[11] The court immediately went on to instruct that "[t]o act with an intent to influence [FHA]" meant to act with "specific intent," and that to establish this element the government had to prove that the defendant knowingly did an act which the law forbids, "purposely intending to violate the law" (C. 514-515). The court later returned to the word "knowingly," stating: "'[k]nowingly' means that the act was done voluntarily and purposely and not because of mistake or accident or other innocent reason" (C. 551).

ARGUMENT

1. 18 U.S.C. 1010 prohibits, *inter alia*, the knowing submission of false statements to the Federal Housing Administration for the purpose of influencing its action. The principal issue in this case is whether the *scienter* requirement of 18 U.S.C 1010 can be satisfied by proof beyond a reasonable doubt that a mortgagee, in applying to FHA for federal mortgage insurance with respect to a property, acted in reckless disregard of the accuracy of information received from the prospective mortgagor and submitted to the agency in support of the application. The facts of this case, in our view, go far beyond showing that petitioners ESC, the Bernsteins, and Behar recklessly failed to verify information contained in mortgage applications; they demonstrate outright collusion between those parties and others in a scheme to deliberately file false and misleading statements of employment and self-employement with FHA in support of applications for insurance that they knew would otherwise not be approved. Alternatively, the Bernstein petitioners and petitioner Behar deliberately "closed [their] eyes" (Bernstein Pet. App. C32) to overwhelming evidence of falsity in statements prepared at the instigation of petitioner Cardona, and "were content" (Bernstein Pet. App. C13) to have such statements submitted to FHA despite their certification in each mortgage insurance application that the information contained therein was true to the best of their knowledge and belief. The trial

court's instructions correctly reflected these facts and the applicable law by informing the jury that the knowledge requirement of 18 U.S.C. 1010 could be satisfied by proof that the defendants either had actual knowledge of the falsity of the statements or had deliberately closed their eyes to whether the statements were true.

Petitioners do not challenge these instructions or the sufficiency of the evidence to support their convictions on either of the two theories. They contend, however, that the trial court erred in charging the jury that there was "a third way" in which they could be found to possess the requisite knowledge of falsity, namely, if the jury found beyond a reasonable doubt (a) that as a mortgagee participating in the federal mortgage insurance program, ESC and its officers had an affirmative duty "to investigate and exercise proper credit judgment" with respect to information furnished in mortgage applications,[12] and (b) that they recklessly stated as facts things of which they were ignorant or acted with a reckless disregard of whether the statements made were true.[13] The court

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[12] As the court of appeals stated (Bernstein Pet. App. C46-C47), it does not matter that the trial court left to the jury the question whether petitioners had such duties if—as the court of appeals concluded—the trial court could have charged that they had such duties as a matter of law. Consequently, the first question presented in No. 75-1798, at pp. 2-3, is without independent significance.

[13] Contrary to the contention of the Bernstein petitioners and petitioner ESC (Pet. 12), the trial court did not charge the jury, and the court of appeals did not hold, that petitioners violated 18 U.S.C. 1010 by a simple "failure to exercise

of appeals agreed that if this charge was erroneous, the conspiracy and false statement convictions of petitioners ESC, Harry Bernstein, and Behar would have to be reversed because there would be no way of knowing upon which of the three theories the jury had found that petitioners had the requisite knowledge of falsity of the statements (Bernstein Pet. App. C42, n. 17).

The court of appeals held, however, that the trial court's instructions regarding a duty to investigate were correct. The court relied in part upon its previous holdings in *United States* v. *Benjamin*, 328 F.2d 854, certiorari denied *sub nom. Howard* v. *United States*, 377 U.S. 953, and *United States* v. *Squires*,

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'proper credit judgment'." As the court of appeals explained (Bernstein Pet. App. C44-C45, C47):

> [T]he charge did not indicate that it was a crime not to exercise "proper credit judgment" and did not equate failure to do so with reckless disregard of the truth. Rather, the charge was that the crime consisted of knowingly submitting an application containing a false statement and that proof of mere negligent falsehood was insufficient. The charge as we read it was that in determining whether there was reckless disregard of the statements' falsity such as to amount to knowledge, it was for the jury to determine whether as mortgagee ESC had affirmative duties in connection with mortgagors' loan guaranty applications. If such duties were found, the existence of potential recklessness was still a question of fact. * * *
>
> * * * *
>
> * * * [T]he court always clearly stated the crime to consist of recklessly stating facts of which the mortgagee was ignorant or acting with a reckless disregard of whether the facts stated were true.

440 F.2d 859, in which it had concluded, for purposes of criminal as well as civil liability, that in areas of fiduciary responsibility under the federal securities laws "persons issuing statements are under an affirmative duty to investigate, and it is entirely appropriate to include 'should have known' within the definition of "know'" (Bernstein Pet. App. C43). The court emphasized that petitioners "ESC, [Harry] Bernstein and Behar knew that the FHA was relying on the Form 2900's submitted, and the mortgagee's certificate's declaration that the information was 'true and complete to the best of its knowledge and belief' carries this obligation [to investigate] at least" (*ibid.*). The court drew further support from "the analogous civil case law [which holds that] the mortgagee, knowing that the federal insurer is 'relying on its professional judgment in a business relationship' has an affirmative duty 'to use due care in providing information and advice' to the federal mortgage guarantor" (*id.* at C45). The court concluded (*id.* at C45-C46):

> The entire scheme of FHA mortgage guaranties presupposes an honest mortgagee performing the initial credit investigation with due diligence and making the initial judgment to lend in good faith after due consideration of the facts found. The trial court in our view could have charged that ESC had commensurate duties as a matter of law, that Harry Bernstein as principal corporate officer did also, and that Florence Behar as officer in charge of processing mortgage loans and signing the mortgagee's necessary certification of the application as "true and complete to

> the best of its knowledge and belief" did likewise. It is our view that delimiting those duties by defining them as duties "to investigate" and to use "good credit judgment" was a fair description of the responsibilities inherent in the relationship between the defendants and the FHA * * *.

The correctness of the court of appeals' decision is demonstrated both by the governing legislation and by the practical relationship that exists between the FHA and mortgagees who participate in the federal mortgage insurance program. Such mortgagees, as the court of appeals emphasized, enjoy the substantial and virtually risk-free benefits of participation in the federal program. In return, the agency depends upon them to take reasonable steps to assure themselves of the truth of information set forth in the applications they submit to FHA. It is for this reason that the mortgagee is required to certify that the information is true to the best of its knowledge and belief. When the mortgagee acts recklessly, without regard to the truth or falsity of the information it submits, its certification of an affirmative belief in the truth of that information is itself knowingly false, since no such belief exists. Beyond that, in view of the special relationship between the mortgagee and the FHA, it is not unreasonable to include "should have known" within the meaning of "known" in construing the scope of the statutory prohibition against false statements. Thus the district court correctly instructed that the jury could find that petitioners had a duty to attempt to verify

the correctness of the information submitted and that they incurred criminal liability when, in certifying the information as true and complete, they proceeded in reckless disregard of the truth.

The decision of the court of appeals is not in conflict with *United States* v. *Ekelman & Associates, Inc.*, 532 F. 2d 545 (C.A. 6) (reproduced at Bernstein Pet. App. D). In *Ekelman* the United States, relying principally upon the False Claims Act, 31 U.S.C. 231, brought suit for damages arising from, and statutory penalties incident to, the submission of false applications for mortgage insurance under the Veterans Administration and FHA home loan guaranty programs. The government argued that a mortgage lender has "an insurer's liability for the inaccuracy of data passing through his hands." *United States* v. *Ekelman & Associates, Inc.*, Civil Action No. 30932, slip op. 6 (June 10, 1974; E.D. Mich.). After a review of Veterans Administration procedures (slip op. 2-5),[14] the district court concluded that the lender's duty to exercise credit judgment was "minimal" (slip op. 5) and did not encompass "an insurer's responsibility for the accuracy" (slip op. 6) of the information submitted.[15]

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[14] Only one of the 32 false submissions was made to the FHA, and the court treated the case as if it involved only the Veterans Administration's lending program.

[15] The district court also rejected the government's alternative theory of liability for common law fraud and deceit, finding "insufficient proof as to [the lender's] actual or constructive knowledge of fraudulent misrepresentations" (slip op. 11).

The Sixth Circuit affirmed, rejecting the government's argument that the lender "had a duty under the statute establishing the VA loan guarantee program to verify the accuracy of the information which passed through its hands * * * and that breach of this duty is sufficient to establish [the lender's] liability under the False Claims Act" (Bernstein Pet. App. D6). The court stated (*id.* at D6-D7):

> The government asserts that a * * * lender * * * should be held liable under the False Claims Act for failing to verify information, subsequently determined to be false, which it certified was "true to the best of [its] knowledge and belief." We agree with the Fifth Circuit's rejection of this position in *United States* v. *DeWitt*, 265 F. 2d 393, cert. denied, 361 U.S. 866 (1959).[16]

That holding is not inconsistent with the decision below, even apart from the fact that it concerns False Claims Act liability with regard to the Veterans Administration loan program rather than criminal liability under 18 U.S.C. 1010 with regard to an FHA program. The court of appeals here did not hold, as the government had urged unsuccessfully in *Ekel-*

[16] In *DeWitt*, the Fifth Circuit absolved from False Claims Act liability a lender that "did nothing but make the loans on what it thought was a valid transaction and had no knowledge, actual or constructive, that [the information it had submitted was false]" (265 F. 2d at 400). Although the court in *Ekelman* at one point indicated that proof of actual knowledge of falsity is required to establish liability under the False Claims Act (Bernstein Pet. App. D5), its approval of *DeWitt* strongly suggests that in fact proof of constructive knowledge would suffice.

man, that mere breach of a fiduciary duty to verify information would suffice for liability if the information was subsequently discovered to be false. To the contrary, the court of appeals emphasized that the district court's "charge did not indicate that it was a crime not to exercise 'proper credit judgment' and did not equate failure to do so with reckless disregard of the truth" (Bernstein Pet. App. C44). Instead, the district court had charged that "proof of mere negligent falsehood was insufficient" and that, even if the jury found an affirmative duty to verify and to exercise credit judgment, "the existence of potential recklessness was still a question of fact" (*id.* at C44-C45).[17]

2. Petitioner Behar contends (Pet. 14-24) that she was unconstitutionally denied representation by retained counsel of her choice when the trial judge found that a conflict of interest existed and ordered her retained attorney to withdraw from representing her. She further contends (Pet. 24-27) that her subsequently assigned counsel rendered ineffective assistance. These contentions are without substance.

When petitioner Behar and the Bernstein petition-

[17] The court of appeals in *Ekelman* further held that a certification of truth to the best of "knowledge and belief" cannot be a misrepresentation of fact under the common law of fraud or deceit (Bernstein Pet. App. D8-D9). Although we question the correctness of that holding, it is not inconsistent with the holding below that the submission of false information covered by such a certification may violate a statute, 18 U.S.C. 1010, that proscribes making, passing, uttering, or publishing a false statement.

ers were subpoenaed by the grand jury, Harry Bernstein told Behar that he would get her an attorney; he thereafter referred attorney Henry Boitel to Behar, and Boitel represented Behar until after she was indicted. With Behar's knowledge and consent, the Bernsteins and ESC paid Boitel's fees during these proceedings (C. 157, 164, 195-196, 215). Since Behar was a co-defendant with the Bernsteins and ESC, the trial court held a hearing to determine whether there was a potential conflict of interest. At the hearing, petitioner Behar stated that she would waive any such conflict of interest. After questioning her at length, however (*e.g.*, C. 157-170, 215-225), the trial court found both that an actual conflict of interest existed in regard to Behar's representation, and that her waiver was not voluntary (C. 254, 260). Upon the court's finding of an actual conflict, attorney Boitel withdrew from the case (C. 261).[18] The court then instructed Behar to retain new counsel, and, if she was unable to do so, to return and request the court to appoint counsel for her. The court subsequently assigned attorney Richard Rosenkrantz to represent her.

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[18] Boitel stated that his withdrawal was subject to his intention to seek reinstatement if he obtained a ruling from the Bar Association that it saw no actual conflict of interest in the case and that it was appropriate for him to stay in the case (C. 260-262). The court, while indicating that "[t]he Bar Association isn't going to run my decisions," agreed to this condition (C. 261-262). Nothing in the record indicates that Boitel followed through on his proposed course and obtained such a ruling from the Bar Association, although some two more months elapsed before the start of trial.

a. Petitioner Behar contends, first, that the court erred in finding an actual conflict of interest (Pet. 18-19). But, viewing the matter prospectively from the standpoint of the trial judge, it is clear that he had reason to believe that such a conflict existed. Petitioner Behar did not deny that she and the Bernsteins would present conflicting defenses at trial; she agreed that "[the Bernsteins'] interest in their defense in this case [was] different from [hers]" (C. 218-219). As the court of appeals described the situation (Bernstein Pet. App. C 23):

> Plainly here there was a probability of conflicting and inconsistent defenses based upon corporate and individual liability, since as an employee of ESC Behar could well take the stand and present a defense that her employers were the guilty ones because she was only obeying the orders of her superiors and following standard office procedure. On their part, they could assert the defense that Behar had acted ultra vires and on her own. Indeed, these were the ultimate defenses advanced by each. Since the codefendants were underwriting Behar's defense, this readily apparent conflict could be seen by the court to indicate a significant probability of prejudice. The freedom of the attorney, whether in cross-examination or assertion of the defense of lack of authority, could have been inhibited and a full and uncompromised defense of his clients' interests have been seriously impaired.

Petitioner Behar contends, however, that she voluntarily waived any such conflict of interest and that,

if the trial court had doubts about her understanding of her waiver, its duty was merely "to make the facts and the problem understood to her" and not to deny her "the freedom of choice" (Pet. 19-23). The record demonstrates, however, that the court painstakingly discussed "the facts and the problem" of the conflict with petitioner Behar (*e.g.*, C. 167-170, 216-224), and that in light of her responses it properly concluded that her waiver was in substantial part the product of financial and other pressures. Moreover, as the court of appeals stated (Bernstein Pet. App. C24), the questioning of petitioner Behar "established that she was not prepared to have the court stand by and do nothing in the event an actual prejudicial action on the part of her lawyer arose. In other words, her waiver was not without strings" (see C. 220, 222-223). Since petitioner Behar's waiver was neither free of elements of compulsion nor unequivocal, the trial judge acted within his discretion in refusing to accept it.[19]

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[19] Neither *Faretta* v. *California*, 422 U.S. 806, nor *United States* v. *Garcia*, 517 F.2d 272 (C.A. 5), conflicts with the factual determination of the lower courts here that petitioner Behar's waiver was not voluntary and unequivocal. *Faretta* established the right of a defendant to dispense with retained or appointed counsel, and *Garcia*, relying in part on *Faretta*, held that multiple defendants represented by the same counsel may "waive their constitutional right to conflict-free representation" (517 F.2d at 276). Both cases, however, reaffirm the principle of *Johnson* v. *Zerbst*, 304 U.S. 458, 464, that the determination "of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case,

b. Petitioner Behar further contends (Pet. 23-24) that, assuming a potential conflict of interest existed and her waiver was not voluntary, the trial judge should have adopted means of avoiding the conflict that would have permitted her representation by Boitel. The trial judge properly concluded, however, that the two alternatives proposed by petitioner either did not sufficiently remove the potential conflict or were impermissible. Petitioner's suggestion that the court appoint Boitel to represent her did not, in the court's view, eliminate the real possibility of a conflict so long as Boitel retained the fees he had been paid by the Bernsteins since the start of the proceedings—the court recognizing at the same time that the fees had been fairly earned and should not be returned. The court likewise properly rejected the suggestion that the government be made to further pare the indictment so as to make possible "a normal two or three week trial" (C. 208) for which petitioner Behar presumably could afford retained counsel.[20] That suggestion invited the court to make

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including the background, experience, and conduct of the accused." Here the trial judge's assessment of these factors persuaded him that petitioner Behar's waiver was not voluntary and intelligent.

[20] Petitioner Behar admitted to the trial court that she currently earned $800 a month and her husband earned $1,000 a month (C. 270). Contrary to her suggestion (Pet. 24, n. 9), the court's subsequent appointment of counsel for her on "strictly a temporary basis" reflected its skepticism as to her claim of indigency, not an attempt to coerce her into a guilty plea.

speculative predictions as to the length of the trial measured solely by the number of counts alleged without regard to the complexity of the underlying legal issues and possible defenses. The suggestion improperly asked the court to force the government to "tailor" the indictment by reference to a clearly extraneous consideration, the financial means of a defendant. The remedy for petitioner Behar's situation was the appointment of competent counsel at public expense, not a command to the government to modify its case.

c. Finally, petitioner Behar argues (Pet. 24-27) that her appointed attorney, Rosenkrantz, did not provide effective assistance of counsel. She notes that he was simultaneously defending an FHA employee in another (unrelated) proceeding against charges of having received bribes from a competitor of ESC. But she fails to demonstrate how this fact created a conflict of interest or caused attorney Rosenkrantz to act less than diligently on her behalf. Behar also refers to the fact that the court allowed Rosenkrantz to be absent during the first four days of procedural matters that took place shortly before trial and permitted counsel for other defendants to "pinch hit" for Rosenkrantz (and *vice versa*) on several occasions during the trial. But the court of appeals, after reviewing the record of Rosenkrantz's performance over a nine-month trial, concluded that his minor infrequent absences had not impaired the quality of petitioner's defense and had resulted in no

prejudice to her. The court stated (Bernstein Pet. App. C 24):

> We find nothing in the record to indicate that Mr. Rosenkrantz did anything other than what highly competent counsel would do, and nothing to indicate prejudice to [petitioner] from his short infrequent absences. On this lengthy trial all counsel pinch-hit to a limited extent for one another; daily copy of the proceedings was available and the district court kept all counsel well informed and left open the right to make any motion as counsel wished.[21]

3. All petitioners except Cardona contend (Bernstein Pet. 14-15; Behar Pet. 27-31) that the false statement counts of the indictment failed sufficiently to identify the statements alleged to be false. This contention was thoroughly considered and correctly rejected by the court of appeals, upon whose analysis we rely (Bernstein Pet. App. C16-C21). The court stated that it is the submission of the false document that constitutes the separate offense under 18 U.S.C. 1010 and that the offenses here were "fully and clearly charged, since the indictment specified the time and place of the transaction and the submission of a particular false application in respect to a particular piece of property" (Bernstein Pet. App. C19). The court further pointed out that petitioners had requested and received a bill of particulars reciting

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[21] At sentencing petitioner Behar stated to the court that she was satisfied with attorney Rosenkrantz's handling of her case (D. 46). ("D." refers to volume VII of the appendix in the court of appeals.)

the false statements in each document, and that "[t]he indictment as amplified by the bill of particulars made clear to [petitioners] what was the nature and cause of the Government's case and gave them ample opportunity to prepare their defense" (*id.* at C19-C20).

The court correctly rejected petitioners' further claim that the failure of the indictment to identify the exact statements allowed the prosecution "to pick and choose * * * without reference to what the grand jury had concluded were false statements" (Behar Pet. 30), contrary to this Court's decisions in *Russell* v. *United States*, 369 U.S. 749, and *Stirone* v. *United States*, 361 U.S. 212. Those decisions are inapposite. In *Russell*, the Court held insufficient an indictment charging a failure to answer questions pertinent to the subject of a congressional inquiry that did not specify the subject of the inquiry. The Court reasoned that "[t]he vice of these indictments * * * is * * * that they failed to sufficiently apprise the defendant 'of what he must be prepared to meet'" (369 U.S. at 764). The lack of specification of the subject of the congressional inquiry would impermissibly permit the defendant's "conviction to rest on one point and the affirmance of the conviction to rest on another" (369 U.S. at 766). No such danger was present here, since the particular false statements were specified well in advance of the trial. In *Stirone*, the district court improperly had allowed the jury to base a conviction upon the exportation of products out of state, even though the indictment mentioned only the importation of raw materials into the state.

No such variance between pleading and proof exists here."[22]

4. Petitioners Cardona and Behar contend (Cardona Pet. 9-12; Behar Pet. 5-6) that the proof of conspiracy adduced at trial varied materially from the conspiracy alleged in the indictment. Petitioner Cardona argues, in particular, that there was no evidence that he was aware of or connected with the bribery aspect of the conspiracy charged and that his conviction was therefore contrary to the rationale of *Blumenthal* v. *United States*, 332 U.S. 539. *Blumenthal*, however, merely rejected a claim that the evidence showed "multiple conspiracies" akin to those the Court had found to exist in *Kotteakos* v. *United States*, 328 U.S. 750. In contrast, the agreements in *Blumenthal* "were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result" (332 U.S. at 558), the evidence showing that all the participants "knew of and joined in the overriding scheme" (332 U.S. at 559).

In the present case, similarly, the court of appeals found that the "pattern of conspiracy * * * does not resemble that of the independent conspiracies in

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[22] Petitioners also contend that the indictment failed sufficiently to allege *scienter* with regard to the false statements. But each false statement count charged that petitioners "did *knowingly* make, possess, utter and publish false statements" (emphasis added). This language does not vary meaningfully from that of the statute itself, which proscribes making, passing, uttering, or publishing "any statement, knowing the same to be false."

Kotteakos"; rather, there was ample evidence of a single conspiracy directed to "a common goal [shared] by all the conspirators to thwart the operation of the FHA loan guaranty program in obtaining FHA insurance of ESC processed mortgages" (Bernstein Pet. App. C31, C34). That petitioner Cardona may not have participated in one of the objects or phases of the conspiracy—the bribery of FHA officials—does not negate the proof that he "sought a common end" with the other conspirators, the defrauding of FHA. See *Blumenthal* v. *United States*, *supra*, 332 U.S. at 559. Courts have repeatedly upheld conspiracy convictions on facts showing "a single conspiracy in the furtherance of which different crimes were committed, or, indeed, in which one coconspirator joined in one of the illegal objects of the conspiracy but not in others" (Bernstein Pet. App. C34). See *United States* v. *Levinson*, 405 F.2d 971, 989 (C.A. 6), certiorari denied, 395 U.S. 958; *United States* v. *Kelly*, 349 F.2d 720, 755-756 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Benjamin*, 328 F.2d 854, 864 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States*, 377 U.S. 953; *United States* v. *Grizaffi*, 471 F.2d 69, 73 (C.A. 7), certiorari denied, 411 U.S. 964.

The danger in multiple-object conspiracies is that a defendant will be prejudiced by the "spillover" of evidence relating to an aspect of the scheme in which he was not a participant. But, as the court of appeals stated (Bernstein Pet. App. C34), that danger is avoided by trial court instructions that "appropriately focus the jury's attention on [the scope of the agreement made by a particular defendant] * * *." *United States* v. *Borelli*, 336 F.2d 376, 386, n. 4 (C.A. 2). Here the court charged the jury that, in determining whether a particular defendant was a member of a conspiracy, it should consider only that defendant's acts and statements; that there was no evidence in the case connecting petitioner Cardona with the bribery aspect of the conspiracy; and that the jury could not consider against Cardona any act or declaration in furtherance of the bribery aspect of the conspiracy (C. 366-367, 375-377). Thus, the court correctly focused the jury's attention on the scope of the agreement entered into by petitioner Cardona and the corresponding limitation upon the evidence that the jury could properly consider against him.

Finally, as the court of appeals noted (Bernstein Pet. C35-C36), the likelihood of prejudicial transfer of evidence was particularly slight in the case of petitioner Cardona:

> [T]here was overwhelming evidence of his participation in the false statement frauds, making this hardly the case "where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence" relating to others. *United States* v. *Miley*, [513 F.2d 1191, 1209 (C.A. 2)]. Cardona points out that one month at trial concerned the CUP prerogative of Cronin and one month the bribing of Goodwin. Cronin, it should be noted, was not convicted, and Cardona's own participation in the false statement scheme was so substantial that in a nine

month trial we cannot find any significant prejudice from bribery testimony which the jury was instructed repeatedly did not connect Cardona to the conspiracy.[23]

5. Petitioners Harry Bernstein and ESC contend (Pet. 3, 19-20) that eleven of the bribery counts on which they were convicted were multiplicitous.[24] The indictment charged them in each of those counts with having paid a bribe of $50 to the FHA appraiser Goodwin in return for an over-appraisal of a specific property. Petitioners' claim rests on the fact that on four occasions Harry Bernstein met with Goodwin and paid him a lump sum for several of these appraisals.[25] Petitioners argue that each lump sum payment constituted a single criminal transaction for which only a single punishment could be imposed.

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[23] Petitioner Behar presents no argument in support of her contentions that the evidence showed the existence of multiple conspiracies and that the trial court erred in not instructing the jury on the issue of multiple conspiracies. The court of appeals, however, thoroughly considered and rejected both of these arguments in portions of its opinion upon which we rely (Bernstein Pet. App. C31-C34, C36-C37).

[24] As noted earlier, Harry Bernstein was convicted on 16 counts of bribery, ESC on 18 counts. The resulting prison sentences were made concurrent, but the fines were cumulative.

[25] Bernstein paid Goodwin $50 each for 7 appraisals on October 6, 1967; $50 each for 6 appraisals on October 20; $50 each for 6 appraisals on October 27; and $50 each for 5 appraisals on December 14 (Tr. 12281, 12409, 12451, 12516, 12661, 12686). Eleven of these payments were charged in the indictment.

But this Court's cases have clearly established that separate offenses may arise out of the same transaction, where each alleged offense requires proof of some fact or element not required to establish the other. *Blockburger* v. *United States*, 284 U.S. 299, 302-304; *Albrecht* v. *United States*, 273 U.S. 1, 11; see *United States* v. *Tarrant*, 460 F.2d 701, 704 (C.A. 5); *Newman* v. *United States*, 212 F.2d 450, 452 (C.A. 6). Here conviction on each bribery count required proof of a bribe in return for an appraisal on a different property.

Moreover, the lump sum payments to Goodwin were "single transactions" in only the most superficial sense. What petitioner Bernstein contemplated, and what the indictment and evidence clearly reflected, was a succession of $50 bribes to Goodwin for each inflated appraisal of a property on Bernstein's behalf. In their dealings, Bernstein and Goodwin treated each property separately from the date Goodwin called to make an appointment for appraisal of a given property until the date of final action on that property by FHA. Even when Bernstein paid the bribes to Goodwin, the men treated the properties separately; they met, compared Goodwin's list of properties appraised with Bernstein's list of properties and determined how many $50 payments Goodwin had "earned" (*e.g.*, Tr. 12144-12281). Strictly as a matter of convenience on those occasions, Bernstein did not hand Goodwin $50 as they discussed each property but waited until the end of the meeting and then gave him the total sum.

In short, petitioners' contention that the pattern consisted of Bernstein inducing "several separate appraisals * * * by a single payment" (Bernstein Pet. 3) is without support in the record, and the indictment properly charged the various bribes in separate counts.

6. Finally, the Bernstein petitioners and petitioner ESC contend, without supporting argument (Pet. 3), that there was an impermissible joinder of parties and counts, and petitioner Behar contends (also without argument) that "the sheer length of this nine month trial [was] the result of an abuse of prosecutorial and judicial discretion" (Pet. 6). The court of appeals fully and correctly answered each of these contentions in portions of its opinion upon which we rely (Bernstein Pet. App. C25, C37-C39).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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